In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 10

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR UNITED STATES STEEL CORPORATION IN OPPOSITION.

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November 20, 1963.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR UNITED STATES STEEL CORPORATION IN OPPOSITION.

This is a Jones Act case brought to recover for the death of a seaman.

It comes to this Court to review the District Court's ruling on a motion to strike from the amended complaint.

OPINIONS BELOW.

The opinion of the United States District Court, unreported, appears in Petitioner's Appendix at page 37; the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 321 F. 2d 518, and appears in Petitioner's Appendix following page 40.

JURISDICTION.

The judgment of the Court of Appeals was entered July 29, 1963; jurisdiction here is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court correctly struck from the amended complaint allegations asserting a claimed new right to recover for the death of a seaman under the maritime warranty of seaworthiness supplemented by the Ohio Wrongful Death Act, in addition to, and alongside of, the cause of action provided by Congress under the Jones Act, which the District Court upheld.

STATUTES INVOLVED.

The statutes involved are set forth in Petitioner's Appendix, the Jones Act, also known as the Merchant Marine Act, 46 U. S. C. § 688, at p. 22; the Federal Employers' Liability Act, 45 U. S. C. § 51, at p. 22; and the Ohio Wrongful Death Act, Ohio Revised Code § 2125.01, at p. 23.

STATEMENT OF CASE.

Petitioner seeks this Court's ruling on a motion to strike from the amended complaint.

The case has not been tried.

It is not even at issue.

It waits the filing of a second amended complaint in the District Court.

—Maritime Accident Is Here Sued Upon.

Decedent, a seaman on a Great Lakes freighter, was, according to the amended complaint, returning from shore leave to his vessel at the National Tube dock on the Black River in Lorain, Ohio. A ladder was let down to the dock to enable the seaman to board. He slipped, the complaint alleges, on the wet dock, fell into the water, and drowned.

Decedent's administratrix brought this suit, claiming recovery (1) under the Jones Act, 46 U. S. C. § 688, by which Congress made the Federal Employers' Liability Act, 45 U. S. C. § 51, applicable to seamen, and (2) under the maritime warranty of seaworthiness "supplemented" by the Ohio Wrongful Death Act, Ohio Revised Code § 2125.01.

—District Court Grants Motion To Strike From Complaint.

The District Court, Judge Paul Jones, in the Northern District of Ohio, granted Respondent's motion to strike from the amended complaint.

The District Court struck the allegations relating to the maritime warranty of seaworthiness and the allegations concerning the Ohio Wrongful Death Act. The District Court ruled in accordance with *Lindgren v. United States* (1930), 281 U. S. 38 (and many other cases) that the remedy for a maritime tort resulting in the death of a seaman is under the Jones Act. The allegations asserting the cause of action under the Jones Act remain, waiting trial.

—How Ruling on Motion Comes to This Court.

The District Court's ruling, striking from the amended complaint the allegations asserting a claim under the maritime warranty of seaworthiness, supplemented by the Ohio Wrongful Death Act, has reached the doors of this Court in the following manner:

Petitioner, without complying with 28 U. S. C. § 1292 relating to interlocutory orders, appealed the District Court's ruling on the motion to strike to the Court of Appeals for the Sixth Circuit; and Respondent moved to dismiss for want of a final appealable order. Thereupon Petitioner filed a separate action in the Court of Appeals for a writ of mandamus to compel the District Court to reverse its ruling on the motion to strike, requested the Court of Appeals to hear that action with the appeal, and urged the Court of Appeals to treat the ruling on the motion to strike as a final order and review the District Court's ruling.

The Court of Appeals obliged. It ruled on the merits, and in an opinion by Judge McAllister, with the concurrence of Judges Weick and O'Sullivan, affirmed the decision of District Judge Jones.

ARGUMENT.

NO BASIS FOR GRANT OF CERTIORARI IS SHOWN.

From what has been said it is manifest that—

I. PETITIONER ASKS THIS COURT TO SIT AS A DISTRICT COURT TO RULE ON MOTION TO STRIKE FROM AMENDED COMPLAINT.

Apart from its lack of merit, this case is not ripe for consideration by this Court.

The case is not at issue.

Whatever rights Petitioner may have are justiciable under the Jones Act.

Once the issues are framed, and the case tried and reduced to judgment, any complaint Petitioner may have may vanish.

The case, therefore, in its present posture, does not commend itself for review in this Court.

Apart from this—

II. DECISION BELOW IS RIGHT.

Petitioner has a remedy under the Jones Act.

No reason appears to justify Petitioner's call on this Court to sit as a legislature to create a new cause of action for death under the maritime warranty of seaworthiness, supplemented by the Ohio Wrongful Death Act.

1. Decision Is In Accord With Long-Settled Law.

The common law of the land, with respect to negligently caused injuries, gave the shore-based litigant a cause of action for such injuries. But it allowed no action for death. To remedy this, wrongful death statutes were widely adopted. But no court has held that the effect of

such statutes is to give the remedy there provided, and also to write into the common law, apart from the statute, a remedy for death.

Similarly, the common law of the sea, i.e., the general maritime law, provided for the seaman the remedy of maintenance and cure, and gave him a cause of action for injuries suffered by reason of the unseaworthiness of the vessel, its appliances, and its gear. But, as in the case of the common law, the maritime law allowed no action for death. *The Tungus v. Skovgaard* (1959), 358 U. S. 588, 590; *The Harrisburg* (1886), 119 U. S. 199. As Mr. Justice Cardozo in *Cortes v. Baltimore Insular Line, Inc.* (1932), 287 U. S. 367, put it (p. 371):

> "Death is a composer of strife by the general law of the sea * * *."

It was to remedy this, as applied to seamen's cases, that Congress enacted the Jones Act, 46 U. S. C. § 688, to make the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51, applicable to maritime deaths.

Petitioner thus has a remedy. The remedy is that which Congress has provided. And just as wrongful death acts enacted by states have not been deemed to provide, in addition to the remedy for death provided by such statutes, a separate remedy under the common law of the land, so has it been in the case of the Jones Act. That statute provides, this Court has held, the sole remedy in the case of the death of a seaman, and no separate additional remedy may be had under the maritime warranty of seaworthiness or under state wrongful death acts:

> *Lindgren v. United States* (1930), 281 U. S. 38, 43-47;
>
> *Panama Railroad Company v. Johnson* (1924), 264 U. S. 375, 392;

Northern Coal & Dock Company v. Strand (1928), 278 U. S. 142, 147.

This Court in *Lindgren*, 281 U. S. 38, reviewed the decisions and pointed out that the Jones Act, also known as the Merchant Marine Act (p. 44):

> "necessarily supersedes the application of the death statutes of the several States."

2. Decision Carries Out Congressional Intent.

The Jones Act, 46 U. S. C. § 688, which Congress enacted in 1920, says that "in case of the death" of a seaman, his personal representative may maintain an action for damages,

> "and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees [i.e., the Federal Employers' Liability Act] shall be applicable."

When Congress thus made the Federal Employers' Liability Act applicable to seamen's cases it already had been established by decisions of this Court that in cases of death governed by the Federal Employers' Liability Act the wrongful death act of a state is inapplicable. *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156, 158; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248, 256. It was well settled, as this Court held in *Seale* (229 U. S. at p. 158):

> "If the Federal statute [i.e., the Federal Employers' Liability Act] was applicable, the state statute [i.e., the Texas Wrongful Death Act] was excluded * * *."

Hence, when Congress made the Federal Employers' Liability Act applicable to seamen's cases, it, under the ordinary canons of construction, took that statute with

the construction this Court had already placed upon it. In the present case, with the Ohio Wrongful Death Act excluded, Petitioner has no claim—apart from the Jones Act. That is why Petitioner—at the cost of violence to language —struggles to write the Ohio Wrongful Death Act into the maritime law. Congress has provided otherwise.

3. No Basis for Dissatisfaction With Existing Law Appears.

Nothing in this record suggests any legitimate basis for dissatisfaction with the existing law. And the argument is not advanced by calling the result "harsh," as Petitioner does (p. 5), or by pretending that the construction adopted by this Court, and followed by the District Court and the Court of Appeals (p. 12) "interprets the Jones Act in such a manner as to diminish seamen's rights * * *." It does no such thing. To the contrary, it makes secure the rights Congress created by the Jones Act.

Indeed, were this Court to reexamine the question, there would be every reason for adhering to the present law. Neither the public good nor the fate of seamen would be enhanced by rewriting the maritime law, as Petitioner suggests. For the uniformity of rule in the adjudication of seamen's cases that the Court has insisted upon, Petitioner would substitute the diversities resulting from the application of numerous and varying state wrongful death statutes. For example, under many such statutes, including the Ohio Wrongful Death Act, contributory negligence would be a complete defense. The statute, if adopted, would come with its full panoply of defenses. *The Harrisburg* (1886), 119 U. S. 199. Seamen's rights would turn, not upon a single nation-wide standard, but upon the ac-

cident of geography, and results would depend upon, and could be controlled by, 50 state legislatures. Congress intended no such result.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 1963.